Neither New York State nor New York City have explicitly ordered Liberty to cease serving subscribers in non-common systems.[1/] The state cable commission, however, is conducting a proceeding, the purpose of which is to consider the timing and content of such an order. The only order currently in effect insofar as the non-common systems is concerned is the standstill order which, at least implicitly, authorizes the continuation of service via the non-common systems until an order requiring the discontinuation of such service is issued. Should it be ordered to discontinue such service and/or should the federal courts hold against Liberty, Liberty will discontinue such service consistent with the relevant orders.

Liberty must be able to conduct its business while the Commission sorts through Time Warner's allegations. Anything less establishes an unrebuttable presumption that Liberty is in violation of the Commission's rules and pays homage to Time Warner's obstructionist behavior. The public interest can only be served by a grant of Liberty's STA requests pending action on the petitions. Liberty hopes and anticipates that the issues raised therein will be resolved in its favor. Regardless, however, of the outcome of

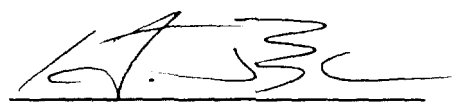
---

[1/] As referenced above, whether a franchise should be required as a condition precedent to such service is presently before the federal courts.

Wherefore, the premises considered, Liberty Cable Co., Inc. respectfully requests that its above-captioned requests for special temporary authority be granted.

Respectfully submitted,

LIBERTY CABLE CO., INC.

By 
Howard J. Barr
Its Attorney

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

May 26, 1995

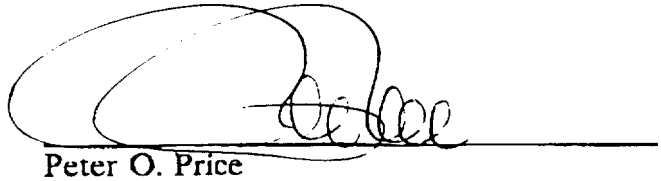
HJB/de
c:\wp\1808\Reply.STA

DECLARATION OF PETER O. PRICE

I, Peter O. Price, do hereby declare and state under penalty of perjury as follows:

1. I am President of Liberty Cable Co., Inc..

2. I have read the foregoing Reply to Opposition to Requests for Special Temporary authority. With respect to statements made in the Opposition, other than those of which official notice can be taken, the facts contained therein are true and correct to the best of my personal knowledge, information, or belief.



Peter O. Price

Date: 5/25/95

HJB/de
c:\wp\1808\Price.Dec

CERTIFICATE OF SERVICE

I, Dina Etemadi, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 26th day of May, 1995, copies of the foregoing **"Reply to Opposition to Requests for Special Temporary Authority"** was sent by U.S. mail, First Class postage-prepaid, to each of the following:

* Regina M. Keeney, Esq.
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

* Laurence D. Atlas, Esq.
Associate Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

* Meredith Jones, Esq.
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

* Richard Kalb, Esq.
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 201-H
Washington, D.C. 20554

\+ Michael Hayden, Esq.
Chief, Microwave Branch
1270 Fairfield Road
Gettysburg, PA 17325-7245

Arthur H. Harding, Esq.
Christopher G. Wood, Esq.
Fleischman & Walsh, L.L.P.
1400 16th Street, N.W.
Washington, D.C. 20036

Dina Etemadi

Dina Etemadi

* By Hand
+ By Overnight Courier

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

JUN 0 9 1995

In Reply Refer To:
95M003

Howard J. Barr, Esquire
Pepper & Corazzini
Suite 200
1776 K St., N.W.
Washington, DC 20006

Henry Rivera, Esquire
Larry Solomon, Esquire
Ginsburg, Feldman and Bress
1250 Connecticut Ave., N.W.
Washington, DC 20036

Federal Communications Commission
Docket 96-41 20
Proceeding TWCV
Disposition: Identified ✓ Received ✓ Rejected
Reporter
Date 1-10-97

EXHIBIT 30
Date: 5/20/96
Reporter: David A. Kasdan

Re: Liberty Cable Co.
Requests for Special Temporary Authority

File No.	Callsigns
708777	WNTT370
708778	WNTM210
708779	WNTM385
708780	WNTT555
708781	WNTM212
709426	WNTM212
711937	WNTM212
709332	(new)
712203	WNTW782
712218	WNTY584
712219	WNTY605
713295	WNTX889
713296	WNTM210
713297	WNTL397
713300	(new)

Dear Counsel: 001

This letter requests additional information regarding allegations of misrepresentations raised by Time Warner Cable of New York City and Paragon Cable Manhattan (collectively "Time Warner") in its Response to Surreply filed June 1, 1995. These concerns are relevant 0107

to the requests for special temporary authority ("STA") filed by Liberty Cable Co., Inc. ("Liberty") referenced above. Time Warner has alleged that the affidavit submitted by Behrooz Nourain with Liberty's Surreply contradicts an affidavit submitted by Mr. Nourain in the U.S. District Court for the Southern District of New York dated February 21, 1995. Time Warner also asserts that the affidavit falsely indicates that transmission paths were inadvertently turned on after the filing of STA requests when in fact the paths were placed in operation in April prior to STA requests made on May 4, 1995. Accordingly, Liberty is directed to explain the inconsistencies between the affidavits. Liberty is also directed to provide the date each unauthorized path was placed in operation as well as the number of subscribers currently being served by each new path. Further, Liberty is requested to address the issue of whether there are contractual or other barriers that prevent the subscribers from electing to receive service from Time Warner or any other provider. Liberty's response should be in the form of a further written statement of fact attested to in accordance with 47 C.F.R. § 1.17.

Pursuant to the authority granted to the Commission by 47 U.S.C. § 308(b), Liberty is directed to respond to these allegations within five days of the date of this letter. Liberty's response should be directed to the Chief of the Wireless Telecommunications Bureau and a copy served on Time Warner. Any answer to Liberty's response shall be submitted no later than five days from receipt of Liberty's response. If you have any questions regarding this matter, please direct your inquiries to the undersigned at (717) 337-1411.

Sincerely,

Michael B. Hayden
Chief, Microwave Branch

cc: Arthur H. Harding, Esq.

whk\barr0522.95\rah

PEPPER & CORAZZINI
L. L. P.
ATTORNEYS AT LAW
200 MONTGOMERY BUILDING
1776 K STREET, NORTHWEST
WASHINGTON, D. C. 20006
(202) 296-0600

ENT A PEPPER
:RT F. CORAZZINI
.:ER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
LOUISE CYBULSKI *
L. CHARLES KELLER *
MICHAEL J. LEHMKUHL *
SUZANNE C. SPINK *
* NOT ADMITTED IN D.C.

GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL
FREDERICK W. FORD
1909-1986

June 16, 1995

Via Telecopy 717/337-1541 & Federal Express

Mr. Michael B. Hayden
Chief, Microwave Branch
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Re: **Reply Ref. No. 95M003**

Dear Mr. Hayden:

Liberty respectfully repeats its request that the Commission grant its STA requests without further delay. Liberty is responding to the each of the questions posed in your June 9, 1995 letter; however, we urge the Commission to grant Liberty the STAs (assuming, of course, that all technical aspects of those applications are in order) and to utilize this information in the context of resolving the pending petitions to deny on their merits. As discussed in Section IV(B) below, Liberty's ability to provide service to new subscribers has been curtailed as a result of the pending petitions to deny. Liberty's ability to continue doing business is at risk. The FCC has not granted Liberty a single OFS license for over four months. Liberty now has 43 pending OFS applications. Fifteen are for the buildings in Section II below, sixteen are for buildings which have con-

tracts with Liberty but where service has not been activated (as discussed in Peter Price's attached letter) and twelve are for the buildings currently being serviced by hard wire which are the subject of the federal litigation discussed below. Liberty has not activated a single new building for over two months. This is precisely the type of situation where the grant of STAs is appropriate, in order to enable Liberty to continue to provide service to subscribers who have requested Liberty service while permitting the FCC adequate time to reach a decision on the merits of Time Warner's petitions to deny.

I. **The Nourain Statements are Consistent**

You have directed Liberty to "explain the [Time Warner alleged] inconsistencies" between an affidavit submitted by Behrooz Nourain, Liberty's Chief Engineer, with Liberty's May 17, 1995 Surreply (in which the Commission was informed of Liberty's unauthorized operations) and Mr. Nourain's February 21, 1995 affidavit, submitted in a lawsuit pending in the United States District Court for the Southern District of New York challenging the constitutionality of 47 U.S.C. § 522(7), the common ownership provision (the "First Amendment Lawsuit"). Specifically, Time Warner has compared Mr. Nourain's May 17 statement that he was unaware of Time Warner's petitions to deny with his February affidavit in which he stated that he had been "advised" of Time Warner's opposition to "Liberty's pending application to the

Federal Communications Commission for various 18 GHz microwave licenses."

Mr. Nourain clarifies this issue in his attached declaration. Exhibit 1, hereto, Declaration of Behrooz Nourain. The placement of each of these statements in its proper context demonstrates that they are consistent.

A. The February 21, 1995 Affidavit and the First Amendment Lawsuit

In order to understand the context of the February 21, 1995 affidavit, a brief summary of events in the First Amendment Lawsuit is necessary. The First Amendment Lawsuit arose out of the attempt of the New York State Commission on Cable Television ("NYSCC") to terminate Liberty's service to subscribers in its "Non-Common Systems"[1/] unless Liberty acquires a franchise from the City of New York[2/]. At the same time that NYSCC was threatening to terminate unfranchised service in Liberty's Non-Common Systems, the City had no procedure to franchise systems that did not utilize City property. On December 9, 1994, NYSCC issued a

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[1/]Liberty's Non-Common Systems are configurations where Liberty serves two non-commonly owned, operated or managed building by placing a microwave reception antenna on the roof of one building and running a coaxial cable to the second building utilizing only private property. 47 U.S.C. §522(7)(B) defines these Non-Common Systems as "cable systems".

[2/]On August 24, 1994, NYSCC issued an Order to Show Cause directing Liberty to demonstrate why NYSCC should not immediately terminate service on its Non-Common Systems. NYSCC initiated this proceeding in response to a May 23, 1994 complaint against Liberty that was filed by Time Warner.

Standstill Order barring Liberty from constructing or activating any new Non-Common Systems.

On December 8, 1994, Liberty commenced the First Amendment Lawsuit against the New York City Department of Information Technology and Telecommunications ("DOITT"). Liberty amended its complaint on December 13, 1994 to include NYSCC. Liberty alleged that the Common Ownership Requirement, on its face and as applied, imposed an unconstitutional burden on its Non-Common Systems under the *O'Brien/Turner* heightened scrutiny test. Liberty also asserted that the City and NYSCC were violating its rights under the due process clause by penalizing Liberty for not having a franchise despite the absence of a City procedure for issuing Liberty a franchise. On the day that Liberty filed the Complaint, it notified the United States' Attorney of this constitutional challenge.

On December 21, 1994, Liberty moved for a temporary restraining order and a preliminary injunction against NYSCC's Standstill Order and against NYSCC's attempts to enforce the Common Ownership Requirement by terminating service to subscriber's in Liberty's Non-Common Systems.

On December 22, 1994, the court granted Liberty the TRO and set a briefing schedule for opposition and reply papers.

The United States and Time Warner intervened as defendants and, along with the other defendants, opposed Liberty's motion. William E. Kennard and the FCC appeared as "Of Counsel" on the

United States' brief. Each defendant, including the United States (*See* U.S./FCC Brief at 22), argued *inter alia*, that the Common Ownership Requirement did not burden Liberty's First Amendment rights because Liberty had "'ample alternative channels for communications'" *Id.*[2/] The United Stated argued that "Liberty could avoid the franchise requirement and fit within the private cable exemption by delivering service to contiguous non-commonly owned buildings using a means other than cable. Thus, Liberty ... could install microwave reception equipment at the contiguous property for buildings with line of sight from their head-end facility, or it could establish a line of sight from a building which could serve as a retransmission point".

It was in response to the argument that Liberty could substitute its coaxial cable links with microwave transmissions, and in an attempt to correct numerous misstatements made by a Time Warner engineer concerning the cost and feasibility of making such a substitution that Mr. Nourain submitted his February 21, 1994 affidavit. In his affidavit, Mr. Nourain addressed two

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[2/]The United States also argued that Liberty's case was not ripe for adjudication because the issue was not fit for review and would not be fit for review until Liberty had applied for a franchise (pursuant to a nonexistent procedure) and could identify each burden imposed by the franchise. U.S./FCC Brief at 10-11 ("Whether the defendants will exercise their regulatory authority in a way that might violate plaintiffs' constitutional rights is not ascertainable on the record that is before this Court"). The United States ultimately prevailed in its ripeness argument before the district court and, when Liberty appealed the dismissal, the United States and the FCC once again argued that Liberty's challenge was unripe.

specific issues. First, he discussed the financial and technical obstacles to substituting microwave transmissions for coaxial links in the Non-Common Systems. Second, he pointed out that Liberty had applied for microwave licenses for Non-Common Systems (which would enable it to implement a substitution if it became necessary) and that those particular microwave licenses had been opposed by Time Warner. In light of the petitions to deny, the arguments made by the government defendants and by Time Warner, that Liberty could serve the derivative buildings in its Non-common Systems by microwave were incorrect and intentionally so[4/].

At the time he submitted his February affidavit, Mr. Nourain understood only that Time Warner had opposed the applications Liberty had filed in an effort to provide an alternative means of service to the derivative buildings in its Non-Common Systems. *See* Declaration of Behrooz Nourain, annexed hereto as Exhibit 1. It was Mr. Nourain's understanding at the time of the February affidavit that those were the only applications that Time Warner had opposed. Exhibit 1.

B. **Liberty's Surreply**

Liberty's Surreply addressed Liberty's provision of unauthorized microwave service to the locations listed in Section II

[4/]Time Warner made this statement despite the fact that, at the same time, it was attempting to delay indefinitely the grant of those applications by filing petitions to deny.

below. It was those locations to which Mr. Nourain's attention was directed during the preparation of that document. Exhibit 1. He was not then discussing buildings that are at issue in the First Amendment Lawsuit, which are not served by microwave and have never been served by microwave. Exhibit 1. Mr. Nourain did not learn that Time Warner was opposing all Liberty applications, including the applications to provide service to the locations Liberty was serving without authority, until April, 1995. Exhibit 1. It was his discovery in April that Time Warner was opposing all Liberty applications to which he was referring in the Surreply. Exhibit 1.

Mr. Nourain's February 21 affidavit and his May 17 declaration were submitted in entirely different contexts. Placement of each in its appropriate context clarifies the alleged inconsistency and demonstrates that Mr. Nourain has been truthful in his efforts to assist in the resolution of this proceeding.

C. **The Timing of the STAs**

Time Warner also alleges "that [Mr. Nourain's] affidavit falsely indicates that transmission paths were inadvertently turned on after the filing of STA requests when in fact the paths were placed in operation in April prior to STA requests made on May 4, 1995." Mr. Nourain was not referencing the May 4, 1995 STA requests in the Surreply nor was it his intention to do so. Exhibit 1. As Mr. Nourain illustrates in his attached declaration, when the paths were rendered operational he was under two

(mistaken) assumptions: (1) that STA requests covering the paths had been filed prior to the time Liberty commenced operation on the paths and (2) that each such STA request was granted prior to the time Liberty commenced operation on the paths. Exhibit 1. It was those requests, which he discovered all to late were non-existent, to which he was referring. Exhibit 1.

II. **Factual Data Concerning the Unauthorized Paths**

Below is a list identifying the date each unauthorized path was placed in operation and the number of subscribers currently being served at each location:

Receive Site	Service Commenced	# of Subscribers
639 West End	February 14, 1995	53
1775 York Ave (the Brittany)	January 16, 1995	80
35 West End	January 3, 1995	335
767 Fifth Ave. (General Motors Bldg)	April 17, 1995	16
564 First Avenue (NYU Medical Resident Hall)	January 3, 1995	56
545 First Avenue (Greenburg Hall, NYU)	January 3, 1995	36
524 E. 72nd	November 16, 1994	146
30 Waterside	March 15, 1995	334
16 W. 16th St.	March 28, 1995	213
433 E. 56th St.	December 27, 1994	58
114 E. 72nd	January 30, 1995	40
25 W. 54th	February 6, 1995	45

200 E. 32nd	March 27, 1995	111
6 E. 44th St.	April 19, 1995	50
2727 Palisades	April 24, 1995	97

III. Ability of Liberty Subscribers to Switch Services

In response to your question, there are no contractual or other barriers erected by Liberty which prevent Liberty subscribers from electing to receive service from Time Warner. Furthermore, with the minor exceptions noted below, there are no barriers to other MVPDs serving these subscribers. Certain buildings cannot readily receive Time Warner service, however, because Time Warner and its predecessors have never wired those buildings for cable. Consequently, Liberty is the first MVPD to provide service to residents of 35 West End Avenue, the two NYU dormitories, the Cornell Club (6 East 44th Street) and the General Motors Building (767 Fifth Avenue). While no contractual barrier prevents those buildings from receiving Time Warner service; in practical terms, it would take weeks -- if not months -- before Time Warner could arrange to provide such service.

With respect to the other buildings on the above list, Time Warner has previously provided service to subscribers therein and building residents currently have the choice between Time Warner and Liberty service. As a cable television company in Manhattan, Time Warner has the *right*, under New York State Executive Law § 828, to provide service to subscribers in any building in which

there is a request for its service[5]. It has the absolute right to do so even over the objection of the property owner. *Id.; See also Loretto v. Teleprompter Manhattan CATV Corp.*, 52 N.Y. 2d 124, 440 N.Y.S. 843, 423 N.E. 2d 320 (1981)(upholding § 828 as a valid exercise of state's police power). Thus, Time Warner retains the right to maintain a presence -- and has, in fact, maintained a presence -- in each of the buildings served by Liberty.

Moreover, nothing in the Private Cable Agreements that Liberty enters into with cooperative, condominium and rental buildings prevents residents of those buildings from continuing to receive Time Warner service or from switching back to Time Warner service after subscribing to Liberty. A copy of a typical Private Cable Agreement is annexed as Exhibit 2.[6] Because every Liberty subscriber has the option to receive Time Warner service, the only device Liberty has for maintaining subscribers is its provision of superior service at a lower price than that provided by Time Warner.[7]

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[5] Section 828 provides, in pertinent part, that "No landlord shall (a)interfere with the installation of cable television facilities upon his property or premises..." N.Y.S. Exec. Law § 828.

[6] Although each Private Cable Agreement differs to a certain degree, as a result of the terms negotiated by each individual building, Exhibit 2 is a representative sample.

[7] Conversely, the vast majority of Time Warner subscribers do not have the luxury of choosing an alternative cable provider if they are dissatisfied with Time Warner's service.

Unlike Time Warner's subscribers, Liberty's subscribers also benefit from contractual protections that they themselves negotiate. When Liberty contracts with a building to provide service, the building's board or owner negotiates provisions that provide its residents adequate protection should Liberty not perform as promised.[1/] Liberty's contracts guarantee subscribers the ability to terminate upon 90 days' notice[2/] if Liberty fails to fulfill any one of the following terms:

(a) install the system during an agreed upon time period;

(b) obtaining the owner's approval prior to implementing installation plans;

(c) repairing any property damage caused by Liberty to the reasonable satisfaction of the owner;

[1/] In addition, each building is free to negotiate any other terms it deems desirable. For instance, some buildings (and all rental buildings) decide to enter into "retail" contracts with Liberty, whereby Liberty markets itself to each subscriber individually for both basic and premium service. Other buildings choose to enter into "bulk" contracts, pursuant to which Liberty provides a lower rate for basic service in return for a guaranteed minimum number of subscribers (frequently substantially less than the total number of units in the building). In these buildings, Liberty still markets itself and contracts directly with individual subscribers who receive premium service. Generally, in buildings that decide to enter into bulk contracts, the building pays Liberty a monthly fee for each basic subscriber and incorporates the fees in the subscribers' monthly common charges.

[2/] In the First Amendment Lawsuit, in which Time Warner is an intervenor, Time Warner's President, Richard Aurelio, falsely asserted that Liberty's subscribers are bound by long-term contracts which can only be terminated on ten years' notice. See Excerpt of Affidavit of Richard Aurelio at ¶33(e), attached hereto as Exhibit 3. In making this assertion of "fact," Mr. Aurelio failed to mention the right of Liberty's subscribers to terminate their contracts under provisions contained in the very contract cited by Mr. Aurelio as "anticompetitive."

(d) providing comparable programming to the local franchised cable television operators;

(e) meeting the standards of cable service, including equipment, new and state of the art technology, inter-activity and programming provided generally by the franchised cable television operator to any other property in the neighborhood of the subscribing property;

(f) providing a video signal comparable to the signal quality of cable television systems as required by the rules and regulations of the FCC;

(g) keeping rate increases under 6% per annum and keeping rates lower than those of the franchised cable operators;

(h) responding to requests for service or repair within one working day after the receipt of such request.

Exh.2 at ¶¶4, 6, 7, 8, 9, 12 and 16. If Liberty defaults on any one of the above obligations, the subscriber is entitled to provide Liberty with a default notice and, in the absence of a cure, to terminate ninety days after the date of the default notice. Id at ¶16.

Some of Liberty's Private Cable Agreements contain a provision in which the building owner promises that "except as required by law for the franchised cable company or any other video distributor, no other pay or cable television service will be distributed at the Property." Id at ¶10. Obviously, this provision does not, and cannot by law, serve as a barrier to Time Warner's continued presence in a building that contracts with Liberty. More importantly, the subscribing buildings have the option of, and in numerous cases actually have, deleted that provision from their Private Cable Agreements. Finally, this

provision is no longer part of Liberty's Private Cable Agreements and has not been so since May, 1995.[10]

Liberty subscribers are free to switch to Time Warner. Furthermore, except as noted, they are free to subscribe to any other MVPD. As Time Warner succinctly put it, "Time Warner is available to provide service to those individuals as expeditiously as possible. Indeed, Time Warner already provides cable service to subscribers in most of these buildings." See Response to Surreply at 11. Time Warner neglected to say that if those subscribers, who have elected to receive Liberty's unique (and more economical) programming services, are forced to switch back to Time Warner, they will have been deprived of the ability to receive the service they choose. This deprivation of the ability to choose the political, business and artistic communication they want to receive is an unconstitutional prior restraint of the subscribers' First Amendment rights.

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[10] Liberty does not need to include any exclusivity provisions in its contracts to guarantee that no competitor other than Time Warner can provide service to its subscribers because Time Warner has already accomplished this feat. With the exception of the subscribers in the approximately 150 buildings served by Liberty, every individual in Manhattan who wants cable television service can receive it from only one provider -- Time Warner. It can be assumed that any other potential competitors to Time Warner have been warned off by the scorched earth tactics that Time Warner has employed to make it nearly impossible for Liberty to continue to operate and expand in Manhattan. As Time Warner admitted in its "Response to Surreply" (see p.11), its solicitous "concern" for compliance with FCC regulations is merely one more weapon in the arsenal it has directed at Liberty.

The assertion implicitly made by Time Warner, that Liberty's subscribers will not be harmed if they are deprived of their choice to receive Liberty's programming and are forced to switch back to Time Warner's, is insupportable. Basic principals of competition law, as well as the First Amendment, guarantee subscribers the right to make their choice of an MVPD in a competitive environment, where they can select among providers who offer competing program content and other price and quality options.

IV. Liberty's Unintentional Activation of the Unauthorized Paths Should Not Bar Grant of the STAs

A. The Merits of the Petitions to Deny Relate to the First Amendment Lawsuit

Liberty requests that the Microwave Branch take official notice of the extraordinary context in which Liberty unwittingly commenced unauthorized service to many of the above referenced locations and then voluntarily disclosed these in its previously filed Surreply. During the last several years Liberty has made numerous requests for special temporary authority and OFS 18 GHz licenses, which heretofore were routinely granted. In January, 1995, Time Warner began filing petitions to deny both the OFS and STA applications of its only competitor in this market. Time Warner cited Liberty's complaint in the First Amendment lawsuit and Liberty's allegation therein that in several instances, Liberty had extended service from building served by microwave to separately owned and operated buildings without the use of public property or rights of way. Liberty disclosed its service to

these so-called "Non-Common Systems" in the First Amendment lawsuit in order to secure a court ruling on the constitutionality of 47 USC §522(7)(B) and, in particular, the constitutional validity of the burdens which that provision os the 1984 Cable Act imposes on speech and press activity occurring wholly on private property. The United States and the Commission were notified of this lawsuit by Liberty and the district court and have participated fully in the lawsuit.

While the Commission has withheld decisions on the pending OFS applications and STA requests for an extraordinary period of time, presumably while it considers the significance of these applications, if any, of Liberty's operation of these so-called "Non-Common Systems," it has simultaneously moved to prevent Liberty from securing a judicial declaration of the constitutionality of §522(7)(B) and therefore prevent Liberty from securing a judicial declaration of the legality of the Non-Common Systems. In other words, the Commission is actively seeking to prevent Liberty from obtaining a court ruling on the legality of the systems which apparently are the impediment to the pending OFS applications and STA requests.[11/]

[11/]Liberty's explanation of the constitutional claims being litigated in the First Amendment lawsuit in this submission does not constitute the submission of such issues to the Commission. These issues are before the federal courts, the proper forum for their resolution.

B. Liberty's Business Is At Risk

Since virtually the filing of Time Warner's first petition to deny, the FCC has not granted any of Liberty's OFS applications. Liberty has not activated service to a new building in more than two months. As a result of Time Warner's petitions to deny, Liberty's business has ground to a halt and will remain in that position unless and until the Commission acts. At the same time that Liberty is foreclosed from providing service to subscribers who have requested such service, Time Warner is using this proceeding as a marketing tool. Recently, Time Warner has sent communiqués to residents of at least two buildings that are in the midst of contracting with Liberty.[12/] On page 4 of the letter, Time Warner makes reference to Liberty's admissions to the Commission to disparage Liberty's character. The letter also refers to the NYSCC proceeding and the First Amendment case to the same end. At the same time that Time Warner is mounting its attack, Liberty is at risk of defaulting on some of its contracts -- an occurrence that will surely be exploited by the Time Warner marketing machine.

[12/]The June 2, 1995 letter, written and signed by Richard Aurelio, the President of Time Warner New York City Cable Group (parent of Time Warner Cable of New York City and Paragon Cable Manhattan, the two franchised cable operators in Manhattan), was sent to residents of 15 West 81st Street and 211 Central Park West. A copy of the June 2 letter is annexed hereto as Exhibit 4.